

E. W. Grobbel Sons, Inc. and Local 26, United Food and Commercial Workers International Union, AFL-CIO. Cases 7-CA-36333, 7-CA-36341(1)(2), 7-CA-36586, and 7-CA-36775(1)(2)(3)

September 30, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND FOX

On March 13, 1996, Administrative Law Judge Benjamin Schlesinger issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief to the Respondent's exceptions,¹ and the Respondent filed a reply brief to the General Counsel's submission.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and con-

clusions³ and to adopt the recommended Order as modified and set forth in full below.⁴

We adopt the judge's finding that the Respondent unlawfully discharged striking employee Fronté Ludy. However, the judge considered this issue under *Wright Line*, 251 NLRB 1083 (1980), and concluded that Ludy's discharge violated Section 8(a)(3) because, the General Counsel having established a prima facie case, the Respondent had failed to establish that it would have terminated Ludy even in the absence of his union activities. The Respondent had argued that it discharged Ludy for strike misconduct. Contrary to the judge's analysis, the correct standard to apply for determining whether an employer has violated the Act by discharging an employee for alleged misconduct arising out of protected activity is set forth by the Supreme Court's decision in *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964). The Court stated there at 23:

In sum, Section 8(a)(1) is violated if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct.

Thus, in *Burnup & Sims*, the Court agreed with the Board that Section 8(a)(1) is violated "if an employee is discharged for misconduct arising out of a protected activity, despite the employer's good faith, when it is shown that the misconduct never occurred." *Id.* (citations omitted). While *Burnup & Sims* concerned a situation involving alleged misconduct which occurred in the course of protected organizing activity, its rationale is equally applicable to situations involving strike related misconduct, as is evidenced by the Supreme Court's favorable citation in *Burnup & Sims* to the Board's decision in *Rubin Bros. Footwear*, 99 NLRB

¹ The General Counsel also filed a motion to strike a portion of the brief that the Respondent filed in support of its exceptions, and the Respondent filed a response to this motion. We deny the General Counsel's motion as lacking in merit because the record reasonably supports the Respondent's factual assertions that the General Counsel seeks to strike.

² The Respondent asserts that the judge's resolutions of credibility, findings of fact, and conclusions of law are the result of bias. After a careful examination of the entire record, we are satisfied that this allegation is without merit. There is no basis for finding that bias and partiality existed merely because the administrative law judge resolved important factual conflicts in favor of the General Counsel's witnesses. *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1949). Furthermore, it is the Board's established policy not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 363 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We note that in the section of his decision entitled "Findings of Fact and Conclusions of Law" at par. 4, the judge stated that "Kitching was subpoenaed to testify at the first 3-day hearing in June 1994," whereas the correct date should read June 1995. Additionally, in the first line of par. 11 in that same section, the judge stated that "Ludy's first police report was not produced" whereas the record shows that Kitching was the employee who purportedly filed that report. The judge in fn. 5 of his decision further stated that Union Representative Moses Boone overheard the conversation in which the Respondent's human resources manager, Kathleen Shields, violated Sec. 8(a)(1) when she engaged in direct dealing by offering the strikers unspecified benefits if they would return to work. The record shows, however, that only employees Phyllis Blackman and Willie Johnson were present when Shields made these remarks and that Blackman later reported the incident to Boone. Nevertheless, we find that correction of these misstatements is insufficient to affect the judge's ultimate conclusions in this case.

³ Although we agree with the judge's finding that the Respondent unlawfully denied employee James Willis his vacation pay during the strike, we find that this conduct violated Sec. 8(a)(3) and (1) of the Act as alleged in the complaint, and not only Sec. 8(a)(1) as the judge found. We similarly find, consistent with the complaint, that Shields' conduct in bypassing the Union and dealing directly with the employees violated Sec. 8(a)(5), as well as Sec. 8(a)(1) as the judge found.

Finally, we agree with the judge that the Respondent did not establish loss of the Union's majority or present evidence of objective considerations to support its claim that the Union did not represent a majority of the unit employees after February 15, 1995. We stress that the Respondent could not have possessed a good-faith doubt of the Union's majority status in this case where, as the judge found, there are unremedied unfair labor practices of the kind that would tend to cause employee disaffection with the Union.

⁴ We shall modify the judge's recommended Order in accordance with our recent decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

610 (1952), in which the Board set forth the burden of proof for striker misconduct cases.⁵

Applying the *Burnup & Sims* analysis, we find a violation here. First, the Respondent does not dispute that Ludy was discharged for alleged strike related misconduct. We would ordinarily next turn to an analysis of whether the Respondent had an honest belief that the employee disciplined was guilty of strike misconduct of a serious nature.⁶ But we find it unnecessary to do so in this case because the judge's findings clearly establish that Ludy did not, in fact, commit the alleged misconduct. Thus, the Respondent asserted that it had discharged Ludy because he had threatened employee Fennice Kitching on August 26, 1994. The facts as elaborated by the judge, however, establish, as he found, that "(1) Ludy never threatened Kitching and (2) [contrary to Kitching's claim] Ludy never went to Kitching's house." These findings in turn support the conclusion that Ludy did not engage in any misconduct. Hence, under the analysis set out in *Burnup & Sims*, the Respondent's discharge of Ludy violated Section 8(a)(1) and we so find.⁷

ORDER

The National Labor Relations Board orders that the Respondent, E. W. Grobbel Sons, Inc., Detroit, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging its employees because of their protected concerted activities.

(b) Bypassing and undermining Local 26, United Food and Commercial Workers International Union, AFL-CIO (the Union) and dealing directly with its striking employees by stating that, if they would abandon their strike and return to work, it would offer them unspecified benefits.

(c) Denying accrued vacation pay to its employees for the purpose of discouraging them from joining, supporting, or assisting the Union, or engaging in other concerted activities for the purpose of collective bargaining or other mutual aid and protection.

(d) Telling its employees that the circulation of a petition concerning the Union was none of their business.

(e) Failing and refusing to reinstate its striking employees to their former or substantially equivalent positions of employment within a reasonable time after the strikers' offer to return to work.

(f) Assigning returning strikers to positions and shifts different from those that they had before the strike.

(g) Conducting polls among its employees concerning their support or lack of support for the Union.

(h) Failing and refusing to execute the written agreement that it reached with the Union.

(i) Withdrawing recognition from the Union as the exclusive collective-bargaining representative of its employees in the appropriate unit set forth below.

(j) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of this Order, offer Fronté Ludy immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the judge's decision.

(b) Within 14 days of this Order, remove from its files any references to its unlawful discharge of Fronté Ludy and notify him in writing that this has been done and that the discharge will not be used against him in any way.

(c) Within 14 days of this Order, make whole Phyllis Blackman, Kevin Felton, Willie Johnson, Anthony Willis, and James Willis for any loss of earnings and other benefits suffered as a result of its failure to reinstate them in a timely manner as set forth in the remedy section of the judge's decision.

(d) Within 14 days of this Order and to the extent it has not already done so, make whole James Willis for the vacation time that was due to him during the strike in the manner set forth in the remedy section of the judge's decision.

(e) Execute and apply retroactively the written agreement that it reached with the Union.

(f) Within 14 days of this Order, make whole its employees for any loss of earnings and benefits suffered as a result of its failure to apply the written agreement that it reached with the Union in the manner set forth in the remedy section of the judge's decision.

(g) On request, bargain collectively and in good faith with the Union concerning rates of pay, hours of employment, and other terms and conditions of employment in the following unit, which is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time production and maintenance employees, including meat cutting and meat handling employees, general labor, packaging, boxers, shippers, heavy truck drivers and maintenance personnel, excluding supervising foreman, superintendents, janitors, office clerical

⁵ See also, e.g., *General Telephone Co. of Michigan*, 251 NLRB 737 (1980).

⁶ *General Telephone*, supra, 251 NLRB at 738.

⁷ It is unnecessary, as in *Burnup & Sims*, supra, to reach or decide whether the Respondent also violated Sec. 8(a)(3) of the Act. See also *General Telephone*, supra, 740 at fn. 21.

workers, salesman, seasonal employees [only in the event that their employment, including summers and holidays, does not exceed one hundred twenty (120) days in one calendar year and that they are not filling the position or performing the work of a regular employee on layoff], and guards and supervisors as defined in the Act.

(h) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its Detroit, Michigan facility copies of the attached notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained by it for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 2, 1994.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge our employees because of their protected concerted activities.

WE WILL NOT bypass and undermine Local 26, United Food and Commercial Workers International Union, AFL-CIO and deal directly with our striking employees by stating that, if they would abandon their strike and return to work, we would offer them unspecified benefits.

WE WILL NOT deny accrued vacation pay to our employees for the purpose of discouraging them from joining, supporting, or assisting the Union, or engaging in other concerted activities for the purpose of collective bargaining or other mutual aid and protection.

WE WILL NOT tell our employees that the circulation of a petition concerning the Union was none of their business.

WE WILL NOT fail and refuse to reinstate our striking employees to their former or substantially equivalent positions of employment within a reasonable time after the strikers' offer to return to work.

WE WILL NOT assign returning strikers to positions and shifts different from those that they had before the strike.

WE WILL NOT conduct polls among our employees concerning their support or lack of support for the Union.

WE WILL NOT fail and refuse to execute the written agreement that we reached with the Union.

WE WILL NOT withdraw recognition from the Union as the exclusive collective-bargaining representative of our employees in the appropriate unit set forth below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Fronté Ludy immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to our unlawful discharge of Fronté Ludy and notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL, within 14 days from the date of the Board's Order, make whole Phyllis Blackman, Kevin Felton, Willie Johnson, Anthony Willis, and James

Willis for any loss of earnings and benefits suffered as a result of our failure to reinstate them in a timely manner, with interest.

WE WILL, within 14 days from the date of the Board's Order and to extent that we have not already done so, make whole James Willis for the vacation time that was due to him during the strike, with interest.

WE WILL execute and apply retroactively the written agreement that we reached with the Union.

WE WILL, within 14 days from the date of the Board's Order, make whole our employees for any loss of earnings and benefits they suffered as a result of our failure to apply the written agreement that we reached with the Union, with interest.

WE WILL, on request, bargain collectively and in good faith with the Union concerning rates of pay, hours of employment, and other terms and conditions of employment in the following unit, which is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time production and maintenance employees, including meat cutting and meat handling employees, general labor, packaging, boxers, shippers, heavy truck drivers and maintenance personnel, excluding supervising foreman, superintendents, janitors, office clerical workers, salesman, seasonal employees [only in the event that their employment, including summers and holidays, does not exceed one hundred twenty (120) days in one calendar year and that they are not filling the position or performing the work of a regular employee on layoff], and guards and supervisors as defined in the Act.

E. W. GROBBEL SONS, INC.

Amy Bachelder, Esq., for the General Counsel.

Patrick C. Hall, Esq. (Frank & Stefani, P.C.), of Troy, Michigan, for the Respondent.

Moses L. Boone, of Detroit, Michigan, for the Charging Party.

DECISION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BENJAMIN SCHLESINGER, Administrative Law Judge. The 1994 negotiations between Respondent E. W. Grobbel Sons, Inc. and Charging Party Local 26, United Food and Commercial Workers International Union, AFL-CIO (Union), went badly. The Union struck; the Union's strike was unsuccessful; the Union ended its strike. In the meantime and after, there were a series of alleged unfair labor practices, including promises of benefits, a discharge, a refusal to reinstate striking employees, and a refusal to sign an agreement accepting Respondent's last offer. Respondent denies that it

violated the National Labor Relations Act (the Act) in any manner.¹

Jurisdiction is conceded. Respondent is a corporation with an office and place of business in Detroit, Michigan, where it engages in the processing of corned beef, roast beef, and pastrami. During the 12 months preceding the filing of the unfair labor practices in this proceeding, it derived gross revenues in excess of \$50,000 and sold and shipped goods valued in excess of \$50,000 directly to points outside the State of Michigan. I conclude, as Respondent admits, that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also conclude, as Respondent admits, that the Union is a labor organization within the meaning of Section 2(5) of the Act and, since September 19, 1984, when it was certified by the Board, is the exclusive bargaining representative of the following unit, which is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time production and maintenance employees, including meat cutting and meat handling employees, general labor, packaging, boxers, shippers, heavy truck drivers and maintenance personnel, excluding supervising foreman, superintendents, janitors, office clerical workers, salesman, seasonal employees [only in the event that their employment, including summers and holidays, does not exceed one hundred twenty (120) days in one calendar year and that they are not filling the position or performing the work of a regular employee on layoff], and guards and supervisors as defined in the Act.

The key to many of the issues in this proceeding, many of which hinge on the credibility of the various witnesses, is contained in one document prepared on August 29, 1994, by Kathleen Shields, Respondent's human resources manager, which she dated August 26, 1994:

Fennice Kitching (a Somebody Sometime temp) was telephoned at his home this evening by Fronté Ludy and Lonnie Smith. During the conversation, Lonnie told Fennice that when he saw him he was going to "fuck him up." Fronté and Lonnie then visited Fennice's home and Lonnie came to the door while Fronté waited in the car. Lonnie banged on the door but Fennice did not answer; instead he called the police. After Lonnie and Fronté left, the Detroit police came and took a report. The police gave Fennice a copy and told Fennice to give the report to Somebody Sometime.

Addendum

Fennice did not report to work on Monday, August 29, 1994, and we were unsuccessful in trying to contact him by telephone. Fennice did report to work Tuesday, August 30, 1994.

¹ The relevant docket entries are as follows: The Union filed its unfair labor practice charges in Cases 7-CA-36333, 7-CA-36341(1), 7-CA-36341(2), and 7-CA-36586 on September 2, 6, and 16, and November 16, respectively. It filed charges in Cases 7-CA-36775(1) and (2) on January 26, 1995, and 7-CA-36775(3) on March 15, 1995. The complaint issued on April 27, 1995, and a hearing was held in Detroit, Michigan, on June 20-22 and September 8, 1995.

On the basis of Kitching's statements and without talking with any of the other participants, Jason Grobbel, Respondent's owner and president, terminated both Smith and Ludy on August 30, as they were standing on the picket line with other striking employees. That event, the General Counsel alleges, caused the employees to convert their economic strike into an unfair labor practice strike. But the consequence of the report is even more significant, because it forms the foundation for credibility findings which in great part sustain the allegations of the complaint. A few words, first, of background. Respondent needed Kitching to sustain its discipline of Ludy. If it discharged Ludy for good cause, then the Union could not claim that its economic strike was converted to an unfair labor practice strike. Then, Respondent might not have had to rehire any of the strikers who offered to return to work and might have had valid defenses to other allegations of the complaint. Kitching was subpoenaed to testify at the first 3-day hearing in June 1994, but did not appear, although Respondent's counsel represented that Kitching cashed his check for attendance. The Region brought, on Respondent's behalf, a proceeding in federal court to obtain Kitching's compliance, and Kitching finally appeared in September. His long-awaited arrival must have come as a shock to Respondent. First, his reason for not having appeared at an earlier date was at best lame. It was that his sister told him that the hearing had been delayed. But he was served with a subpoena dated June 6 and returnable on June 20, the day that the hearing took place. Because Respondent's counsel represented that he had been trying to contact Kitching for days and that Kitching had promised to attend, it is utterly improbable that Kitching's sister would have had any information leading her to tell her brother that the hearing had been canceled. Furthermore, Kitching was a most fragile witness, emotional and once in tears. His demeanor and stability indicated anything but reliability.

But, assuming that someone would believe him, the above-quoted statement does Respondent little good, also. Although there may have been a basis for discharging Smith based on his threat, there is nothing in the statement to support any discipline of Ludy. His driving hardly made him culpable. So, in order to make a better case against Ludy, his actions had to be expanded to something more meaningful and more heinous. Grobbel urged Kitching to do so, and, because Kitching had allegedly lost the report that the Detroit police had given him (at least, according to Grobbel, because Kitching testified, contrary to his statement to Shields, that the police never gave him a copy of the report), prompted Kitching to file a new report with the police. And, like Pinocchio's nose, the story grew, and Grobbel supported that story, as did Shields. By the time of the hearing, Ludy no longer sat in his car. According to Respondent's brief, "Kitching told Jason Grobbel that Fronté Ludy called him on the night in question, began asking him why he was working during the strike and that Ludy thereafter made threats to Kitching that he was going to 'blow up his house' and 'fuck him up' and 'kill his girlfriend and family.'" Again, according to the brief, Shields "received a call from Kitching on the Monday following the incident and confirmed that Kitching told her two individuals, *Lonnie Smith* and *Fronté Ludy* had threatened him on the previous Friday evening and that he was afraid to cross the picket line as a result." (Emphasis in original.)

But, although the brief accurately portrays the testimony of Grobbel and Shields, that was not in the statement that Shields prepared on August 29 (with an addendum on August 30) and Kitching signed on August 30, 4 days after the alleged telephone call. Shields was asked whether the statement included everything that Kitching told her. She answered that she was certain that it did, even including the quotation. She prepared it immediately after her conversation so that she "could remember as many details as possible." What has happened here is that Respondent has taken a story and inflated it out of proportion to justify its actions and to defeat the allegations of the complaint. And, in doing so, the credibility of both Grobbel and Shields has become irreparably undermined. If they were guilty of fictionalizing the discharge of Ludy, as I find, they were capable of misstating other facts and cannot be trusted. Thus, my findings of fact are based generally on discrediting their testimony and, as a result, crediting most of the General Counsel's witnesses, even though I might otherwise have had misgivings about some of them. To the extent, then, that there is testimony which conflicts with my findings, I credit the witnesses whose testimony I rely on. In making these credibility findings, I have fully reviewed the entire record and carefully observed the demeanor of all the witnesses. I have also taken into consideration the apparent interests of the witnesses; the inherent probabilities in light of other events; corroboration or the lack of it; the consistencies or inconsistencies within the testimony of each witness and between the testimony of each and that of other witnesses with similar apparent interests. Testimony in contradiction to that upon which my factual findings are based has been carefully considered but discredited. See generally *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962).

The 10-year relationship between the Union and Respondent was unremarkable until 1994, when their negotiations for a new agreement (the old agreement expired on April 28, 1994) met an unhappy end after about six or eight meetings. They were far apart on money issues, including wages and health insurance and pensions. The Union rejected Respondent's last offer and struck on August 25. There is no dispute that the strike at its inception was purely economic. On September 14, the parties met to settle their differences. The Union attempted to move the money in the package from the section 401 benefit plan to wages. Respondent renewed its final offer. Grobbel indicated that he had hired some permanent replacements, but, if the striking employees notified him by Friday that they would be back by Monday, he would make room for them. In addition, he would pay them for Labor Day.

On Friday, September 16, Union President James Franzé spoke to Grobbel three times. First, he wanted Ludy and Smith reinstated and asked whether Grobbel would consider an unconditional offer to return to work from all the employees, including the two fired employees. Grobbel wanted to know what that meant, particularly whether the Union would strike again. Franzé answered that the employees would return under the terms of the expired agreement and attempt to reach an agreement. At about 3 p.m., they spoke again. Grobbel did not want to consider anything; the final offer "was it." Otherwise, Franzé could forget about returning. Franzé, not mentioning Ludy and Smith, countered by making an unconditional offer that the employees would return

to work. Grobbel insisted that it be under his terms of the final agreement. The final conversation occurred when Franzé asked for Respondent's fax number because he wanted to make an unconditional offer on behalf of the employees. It was not contingent on the rehire of the two employees. Grobbel again insisted that, if the strikers returned, it was under the terms of his last offer. He did not want the two discharged employees under any circumstances and did not want the seven employees under Franzé's terms. Grobbel wanted a response by 4 p.m., but Franzé sent his fax between 5 and 6 p.m. The strikers returned on September 19, and Franzé spoke to Grobbel shortly after 6 a.m. Franzé said that the employees were there, but Grobbel said that he had no work for them that day. Grobbel wrote that day that the positions of the remaining five striking employees (he excluded Ludy and Smith) had been filled by permanent replacements and placed the five on a preferential hiring list, to be contacted when substantially equivalent work became available. Respondent recalled all but the two discharged employees, some to report on September 26 and others on October 3. Later, on January 17, 1995, the Union reconsidered Respondent's last offer and accepted it.

Grobbel terminated Ludy and Smith by delivering letters to them on the picket line stating that the reason for their discharge was "misconduct" against Kitching on August 30. The strikers on the picket line were uniformly shocked. Employee Phyllis Blackman asked how Grobbel could trust a temporary worker like Kitching, without even asking Ludy about his position, and said that Respondent simply wanted to pick off the employees, one by one. Employee James Willis said that he was present when Ludy called Kitching and did not hear anything wrong. Union Business Agent Moses Boone thought that the firing of Ludy could be an unfair labor practice, because Section 7 of the Act guaranteed the right to strike without interference. On September 6, the day after Labor Day, the Union's picket signs were changed from "On Strike. Please Do Not Patronize" to signs that protested Respondent's unfair labor practice. There is ample evidence in the record to demonstrate that the employees now protested the discharges and that the strike had changed from one that was purely economic to one that, at least in part, was a protest against Respondent's conduct. *Gloversville Embossing Corp.*, 297 NLRB 182 (1989). That is sufficient to constitute a conversion of the purpose of the strike, assuming that Ludy's discharge was an unfair labor practice. *F. L. Thorpe & Co.*, 315 NLRB 147, 149-150 (1994).

The problems with Kitching's story (and his testimony) are not minor. According to what he originally told Shields, Ludy was on the telephone, but made no threat; and Ludy went to Kitching's house, but made no threat. Smith was the only person who threatened him, and only in the telephone call. Ludy stayed in the car; but that story changed, and, according to Kitchen, Ludy was banging at the door and Smith was on the sidewalk, or Ludy was on the sidewalk, and then James Willis, who was never previously identified as having been anywhere near Kitching's house, was identified by Kitching as being in the car. Perhaps the most compelling testimony was that of Anthony Willis. He was an employee at the time of the strike, a supporter of the Union; but at the time of the hearing, he was a supervisor. If he had a reason to fabricate, surely his testimony would more likely favor Respondent. However, he was not very helpful. He called

Kitching the night that Kitching said that he was threatened to make a date to go to some topless nightclubs, and the two went out to party until about 3 or 3:30 a.m. Kitching did complain repeatedly about Smith's threat ("He gonna' kick my ass if I go back to work"), but was silent about any threat from Ludy. Kitching even told Anthony that he had called the police, but he never mentioned to Anthony that anyone had come to his house until weeks later, after Anthony had been recalled to work.² Strangely, then, in describing the event to Anthony, Kitching said that Ludy and Smith had arrived in a white car. All other witnesses who knew that Smith had a car identified it as either red or burgundy. Even stranger, Kitching stated in his investigatory affidavit that he gave to the Region: "I don't know if they were driving a car or what."

Furthermore, Ludy's first police report was not produced because it was allegedly lost (or, as Kitching testified at trial, was never given to him); but Respondent could have obtained the report from the police. The failure to obtain it or perhaps even to try to obtain it leads me to the conclusion that Respondent did not want it. The reason is simple: if it existed and implicated anyone, it did not implicate Ludy, only Smith. When Ludy came to work on August 30, Grobbel needed new reports to the police to support Respondent's claim against Ludy, and that is the genesis of the new reports. But the new reports were merely an expansion of Kitching's imagination, urged on by Grobbel's dislike for the Union's strike. The strike had begun on August 25 with some union vandalism: Grobbel arrived, only to find all the locks glued, delaying the employees' entry into the facility for about 2 hours. He immediately warned Keith Nummer, the Union's director of organizing and a business agent, that, if there were a continuation of that type of activity, any employees found responsible would lose the right to return to work. In defending his dismissal of Smith and Ludy, he said: "I'm not going to [be] negligent of inaction, you know, when something like this is going on, and have someone get hurt. That's not going to happen on my watch." With this attitude, it is no wonder that he seized on Kitching's charge, but that does not exonerate Grobbel. There is still the problem of what he knew, and his lack of knowledge that Ludy did anything wrong is telling and dispositive. He took his action based on Kitching's word. Kitching, Grobbel testified, was sincere (he cried), and Ludy was not. But Kitching was not even his employee; he was an employee of Somebody Sometime and had been working at Respondent's facility for two weeks. Ludy had been there for five years. And Grobbel did not ask Smith or anybody else about the incident. Nor did he apparently think about the differences between what Kitching originally told Shields on Monday from what he told Grobbel on Tuesday. Nor did he give any thought about the missing report that the police gave Kitching on August 26, a report that Kitching originally could not find, a report that he then thought that he gave to Somebody Sometime, and a report that neither Somebody Sometime nor the police was able to locate.

It is unnecessary to find specifically all the facts of what really happened. The facts result from my disbelief of

² Kitching denied that he went to nightclubs with Anthony, admitting only that he went out driving for a while.

Kitching³ and belief of Ludy to the extent that (1) Ludy never threatened Kitching and (2) Ludy never went to Kitching's house. Thus, I find that Respondent had no cause to discharge Ludy, that its entire case is built on lies, and that its defense is a sham. Under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983), the General Counsel must prove that Ludy's union activities motivated Respondent to act as it did. The General Counsel did so. Grobbel seized on the complaint of a person who has substantial problems in telling the truth and who may have substantial emotional problems besides and expanded the incident to discharge two of the union adherents. He did nothing to investigate the matter, but was willing in order to get revenge on the Union, which had put glue into Respondent's locks, to take the word of someone whom he barely knew. There is an ample prima facie case here. Once having met the burden of proving a prima facie case, Respondent must demonstrate under *Wright Line* that it would have taken the same action that it did, even in the absence of Ludy's union activities. There is no showing that Ludy did anything that would support Respondent's action. I conclude that Respondent violated Section 8(a)(3) and (1) of the Act.

Thus, the strike became on September 6, 1994, an unfair labor practice strike, and on the Union's unconditional offer of the return of the strikers, Respondent was required to reinstate all the strikers to their prior positions, removing any replacements hired from the time that the strike was converted from an economic strike. Respondent contends that the Union did not make an unconditional offer. I disagree. There was obviously a dispute between Grobbel and Franzé about the return of the strikers. It was Grobbel who imposed a condition, that the employees could return only if the Union agreed to Respondent's final offer. On the other hand, Franzé was willing to have the employees return under the terms of the old contract and then he and Grobbel would continue to negotiate for a new one. Furthermore, Respondent never claimed that the Union's offer was conditional. It was only at the hearing that Grobbel testified that, at the time that the employees returned, he had imposed the terms of its final offer. He never told the Union, however, if he told anyone at all. In fact, there was no evidence that anything was changed, because the only alteration affected the pay of the trucker after 5 years, and the trucker had not been employed that long, so the increase had not yet had any effect. As to the other changes, Grobbel was merely exploring the process of putting them into effect. The Union thus had no knowledge that Respondent had implemented its last offer and the

last offer was not really implemented in any event. I find, therefore, that the Union's offer was unconditional.

On September 6, Respondent hired two permanent replacements. The record does not supply any information of the time that those employees' employment was made permanent. It was incumbent that Respondent supply that proof. Because the strike was converted to an unfair labor practice strike that same day, there is no proof that Respondent hired the permanent replacements before the conversion, nor is there any proof that these two replacements were still employed when the Union made its unconditional offer to return. Accordingly, I conclude that all the unfair labor practice strikers were entitled to their jobs immediately on their unconditional offer. None of them were offered immediate recall, and Respondent violated the Act by failing to recall them. Respondent finally recalled James Willis and Phyllis Blackman to report on September 26 and Anthony Willis, Willie Johnson, and Kelvin Felton (on a temporary basis) to report on October 3. In addition, Respondent never recalled Phyllis Blackman to her former job. Before the strike, Blackman was the assistant leader in the packaging department and worked in packaging and slicing on the day shift (6 a.m. to 4:30 p.m.). Respondent recalled her to the afternoon shift (3:30 p.m. to about 2 a.m.), and she was assigned to do sanitation, requiring heavy lifting and climbing and cleaning the facility with chemicals that made her sneeze and cough. Never before, in her experience, had a woman been assigned to these duties. I conclude that Respondent did not recall her to her prior position.⁴ I also conclude that Respondent's failure to recall all the striking employees timely after their unconditional offer to return to work violated the Act.

All the striking employees attended the September 14 negotiating session. The complaint alleges that Grobbel stated that they had been permanently replaced and that violated the Act, because, as unfair labor practice strikers, they could not be permanently replaced. Nummer testified, however, that he raised the entire issue by asking Grobbel whether anybody had been replaced, and Grobbel said yes, but did not know how many. The testimony of the other union representatives was somewhat different: Grobbel merely stated that he had hired some (according to Franzé) or two (according to Boone) permanent replacements. To prove a violation, it is incumbent that the General Counsel show that Grobbel's answer was false. The record is not clear that Respondent did not hire two permanent replacements before the Union's strike was converted from economic to one protesting an unfair labor practice strike. In these circumstances, I conclude that Respondent did not violate the Act.

The complaint alleges a number of additional 8(a)(1) allegations. One was that Shields stated to the strikers, about a week or so after the strike began, that she missed them and that she would really like the strikers to come back. If they came back, she could help them, but she could not help them as long as they were on strike. That constitutes direct dealing with the employees and a promise to them of something of

³ Respondent contends that Kitching had no reason to fabricate his testimony. That may be so, but it may be that Kitching is simply an unreliable, unstable, and agitated person who is not truthful. It may also be, as suggested by the counsel for the General Counsel, that Kitching had a reason, and that was to excuse his absence on Monday. Kitching testified that he did not call Shields on Monday. Shields testified that he did, to explain that he would be absent because he was fearful of being beaten if he came to work. However, when Grobbel called him that Monday at home, there was no answer. At any rate, Kitching came to work on Tuesday. The record does not reveal why his fears were allayed between Monday and Tuesday.

⁴ The counsel for the General Counsel advised during the hearing that she was seeking for Blackman a make-whole remedy only for the period of the delay in recalling her. Furthermore, Respondent failed to prove that Blackman's position had been filled by a permanent replacement.

value if they would abandon their strike, a protected activity.⁵ Another alleged incident of direct dealing occurred when Grobbel told the strikers on the picket line that he would like them to return, and if they returned, he would pay them their holiday pay for Labor Day. Grobbel testified that his comments were directed to Nummer. Nummer recalled one conversation with Grobbel on the picket line, but could not recall all its contents. Other employees were unable to recall whether Nummer was present at the time of the alleged direct dealing; and, in general, they had difficulty recalling when Grobbel made his comments. Blackman supported the allegation, but, in her investigatory affidavit, averred that no one other than Shields made statements to the striking employees on the picket line. I find the General Counsel's proof insufficient to sustain this allegation, which I will dismiss.

During the strike, James Willis asked Grobbel the reason that his 2-week vacation, which had been approved and scheduled to begin on September 6, during the strike, had been canceled. Grobbel replied that Willis could not be on vacation and on strike at the same time. Willis asked Grobbel whether he meant that he could not be in two places at the same time, to which Grobbel answered yes. Willis said that he had earned his vacation by working in 1993 and Grobbel could not hold the strike against him. Grobbel replied that that was his position. Whether Respondent violated the Act must, under *Texaco, Inc.*, 285 NLRB 241 (1987), be resolved by application of the rationale set forth in *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33-34 (1967). The Board stated, at pages 245-246:

Under this test, the General Counsel faces the prima facie burden of proving at least some adverse effect of the benefit denial on employee rights. The General Counsel can meet this burden by showing that (1) the benefit was accrued and (2) the benefit was withheld on the apparent basis of a strike

Once the General Counsel makes a prima facie showing of at least some adverse effect on employee rights the burden under *Great Dane* then shifts to the employer to come forward with proof of a legitimate and substantial business justification for its cessation of benefits Moreover, as under *Great Dane*, even if the employer proves business justification, the Board may nevertheless find that the employer has committed an unfair labor practice if the conduct is demonstrated to be "inherently destructive" of important employee rights or motivated by antiunion intent. [Footnotes and citations omitted.]

The General Counsel proved that the benefit had accrued. Employees were entitled to receive vacation pay in accordance with their years of service, as follows: 1 year, 1 week; and 3 years, 2 weeks. Willis had more than 3 years' employment. He was thus entitled to 2 weeks' vacation. He had asked for his vacation before the strike, and Respondent had approved his request. (Although Respondent contends that

Willis had to ask for his vacation 2 months before, that provision of the agreement was not followed in practice.) Grobbel contended that all vacations were canceled for all employees, including supervisors. He also conceded that the vacations were canceled because of the strike, but contended that Willis' vacation was not canceled because he was striking. That is not "a legitimate and substantial business justification for its cessation of benefits." Indeed, Respondent's action punishes Willis because the Union, he and his fellow employees, exercised their Section 7 right to strike. That, I conclude, violates Section 8(a)(1) of the Act. *Stokely-Van Camp v. NLRB*, 722 F.2d 1324 (7th Cir. 1983), relied on by Respondent, is distinguishable, because it was Grobbel, not some minor supervisor, who made the remark about the impossibility of being on strike and on vacation at the same time, a clear showing of antiunion motivation. In addition, Respondent had no business reason for wanting Willis to return, in light of its present (albeit discredited) position that it had permanently replaced all the striking employees.

Finally, after the strikers returned to work, there was placed on a table in the cafeteria a petition for employees to sign to decertify that Union. Blackman, having been advised by James Willis about it, went to look at it. Supervisor Larry Buckmiller picked it up and said that it was his and did not concern her. Blackman said that she had heard "about them trying to get rid of the Union." Buckmiller said that he did not have anything to do with the Union and that the document was his paperwork. Because the right to withdraw from engaging in union activities is equally protected by Section 7, Respondent denied Blackman of that right and thus violated Section 8(a)(1) of the Act.

On January 17, 1995, Franzé wrote to Grobbel agreeing to Respondent's final offer of July 28, 1994. Grobbel replied on February 10, 3 weeks later, that he had a "good faith doubt" that the Union continued to enjoy the support of a majority of the unit employees. He, therefore, was going to poll the employees on February 15 to determine whether the Union still represented a majority and invited the Union to have a representative present. On February 13, Franzé rejected that offer, noting that an unfair labor practice complaint had already issued and additional charges had been filed regarding other matters that are the subject of this proceeding. He threatened to file still more charges. On February 16, he forwarded two signed copies to the agreement to Respondent, which has refused to sign them.

Respondent contends, first, that there is no showing that the parties had ever reached complete agreement on anything as of January 17. However, it avoids utterly discussion of the fact that the Union accepted Respondent's final offer, whatever that was. Franzé explained the manner in which the parties negotiated. They worked from the expiring contract and each proposed and exchanged modifications to it. They reached agreement on some of the modifications and signed those agreements. Only one agreement was oral, an addition of a sentence that had been deleted from the old arbitration provision. The final agreement conformed to the manner in which they negotiated, being the old contract with the terms that had been agreed on by the parties during negotiations and the addition of Respondent's final offer. Grobbel did not testify that any provision was incorrect. In fact, Grobbel testified that he had never even read the contract; and his letter claimed only that he was rejecting recognition.

⁵ Blackman claimed that she was discharged by Respondent; but it was found that she quit. It may be that she was biased against Respondent because she was ineligible for unemployment compensation. And it also may be that her perceptions are subject to some doubt. However, Boone and Johnson heard the same conversation, and I credit it.

Rather, Respondent maintains the position that the offer was withdrawn, but factually it is incorrect. No one testified to a withdrawal; and, when the Union accepted Respondent's final offer, Respondent did not object that its offer had been withdrawn. Accordingly, I will not find a withdrawal. The Board has traditionally not been bound by technical rules of contract law. Thus, a contract offer is not automatically terminated by its rejection or a counterproposal, but may be accepted within a reasonable time unless it was expressly withdrawn prior to acceptance, expressly contingent on a condition subsequent, or was subject to intervening circumstances which make it unfair to hold the offer to its offer. Accordingly, Respondent's final offer remained open because it was not explicitly withdrawn and Respondent proved no circumstances that would have led the Union to reasonably believe that the offer was withdrawn. *Sunol Valley Golf Club*, 310 NLRB 357, 367 (1993), enfd. sub nom. *Ivaldi v. NLRB*, 48 F.3d 444 (9th Cir. 1995). The mere fact that the strike intervened and that the parties negotiated for 4 months does not detract from a finding that the offer, never withdrawn by Respondent, was still open. *Worrell Newspapers*, 232 NLRB 402, 405-407 (1977). Respondent should not complain. It could have, had it desired, withdrawn its offer; but it did not. *Hydrologics, Inc.*, 293 NLRB 1060, 1063 (1989). The Union was thus free to accept it.

Respondent contends that *Bickerstaff Clay Products Co. v. NLRB*, 871 F.2d 980 (11th Cir. 1989), relying on *Pepsi-Cola Bottling Co. v. NLRB*, 659 F.2d 87 (8th Cir. 1981), compels a finding that its good-faith doubt about the Union's majority status was itself a change in circumstances giving rise to a reasonable belief that its offer had been withdrawn.⁶ However, Respondent may not rely on its good-faith doubt in an atmosphere of unremedied unfair labor practices such as are present in the instant case. *Barclay Caterers*, 308 NLRB 1025 fn. 2 (1992), citing *Nu-Southern Dyeing & Finishing*, 179 NLRB 573 fn. 1 (1969), enfd. in part 444 F.2d 11 (4th Cir. 1974). Furthermore, Respondent may not rely on a good-faith doubt of the majority status of its certified incumbent union as a defense to a refusal to execute an agreed-on contract, because its purported good-faith doubt was not raised before the contract was created. *Auciello Iron Works*, 317 NLRB 364, 368-370, 375 (1995), enfd. 60 F.3d 24 (1st Cir. 1995), cert. granted 116 S.Ct. 805 (1996). Here, Respondent first communicated its doubt 3 weeks after the Union accepted the final offer.⁷

In addition, Respondent's withdrawal of recognition and poll were improper. The Union, as the incumbent certified Union, enjoyed a rebuttable presumption following the expiration of the collective-bargaining agreement that it represented a majority of bargaining unit employees. *Auciello Iron Works* at 367. Respondent could not withdraw recognition from the Union unless it had lost its majority. Respondent does not claim that the Union lost its majority status at any relevant time before February 15, 1995, and Respondent did not prove facts demonstrating a good-faith doubt based on objective evidence that the Union no longer represented

a majority. Two persons who did not honor the picket line and the lack of a union steward and checkoff authorizations are not enough. Accordingly, under Board law, by which I am bound, Respondent had no right to withdraw recognition.

Similarly, it had no right to poll its employees, with the background of Respondent's unfair labor practices. Its poll was no more than blatant interrogation, to ascertain how its employees viewed the Union. One person had already been fired, and promises had been made to try to get the employees back to work and off the picket line. This was simply another attempt to cause the employees to fear reprisals in the event that employees supported the Union and tended to intimidate them should they support the Union. Respondent's reliance on *Struksnes Construction Co.*, 165 NLRB 1062 (1967), is misplaced. *Struksnes* applies only when "the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere," at page 1063, a situation not present here.

The unfair labor practices found here, occurring in connection with Respondent's business, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that Respondent unlawfully discharged Fronté Ludy, I shall order Respondent to offer him immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of wages and benefits he may have suffered as a result of the unlawful discharge. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I shall also order Respondent to make James Willis, Phyllis Blackman, Anthony Willis, Willie Johnson, and Kevin Felton whole for any loss of earnings and other benefits suffered as a result of Respondent's failure to reinstate them timely to their former positions, in the manner prescribed above. I shall also order that Respondent, upon request, to the extent it has not already done so, make whole James Willis for the vacation time that was due to him during the strike, computed in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest. I shall order that Respondent execute and apply retroactively the written agreement that it made with the Union and that it make its employees whole for any loss of earnings and other benefits suffered as a result of its failure to apply the written agreement that it made with the Union, computed as prescribed by *Ogle Protection*, and as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), with interest. Finally, I shall order Respondent to bargain collectively and in good faith with the Union.

[Recommended Order omitted from publication.]

⁶ Respondent also relies on *Curtin Matheson Scientific v. NLRB*, 859 F.2d 362 (5th Cir. 1988), reversed on other grounds 494 U.S. 775 (1989).

⁷ Respondent's answer alleges that the Union ceased to be the collective-bargaining agent of the employees in the unit on February 15, 1995.